NO. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERO, Respondent

FROM THE COURT OF APPELAS, DIVISION II
In the Matter of the Personal Restraint Petition of Heidi Fero
NO. 46310-5-II

RESPONSE TO BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Senior Deputy Prosecuting Attorney
OID #91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Unpublished Cases

IDENTITY OF PETITIONER AND AMICUS CURIAE

The State of Washington is the petitioner in the matter before the Court, caption *In re the Matter of the Personal Restraint of Heidi Fero*, No. 92975-1. The National Association of Criminal Defense Lawyers appears in this case as amicus curiae.

ARGUMENT IN RESPONSE TO THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

The amicus brief of NACDL can be summarized as follows: First, the existence of new or changed opinions about a scientific principle should satisfy the test for newly discovered evidence. This rule would virtually eliminate finality in any case, criminal or civil, involving medical or scientific testimony. The State discusses this issue at length in its supplemental brief of Petitioner and refers this Court to its argument contained in that brief. Second, that a defendant who was convicted after a trial in which scientific evidence was admitted should be exempted from the due diligence requirement in both discovering new evidence and in filing a personal restraint petition. This Court should reject both of these claims.

I. The cases relied on by NACDL are unpersuasive.

The State addressed in its Supplemental Brief of Petitioner the sound reasons for not allowing defendants to obtain new trials simply by procuring new expert opinions applied to evidence that was known at the time of trial. The State explained that such a rule would virtually eliminate the concept of finality of criminal convictions and merely impeaches the testimony offered at the trial.

The State nevertheless responds to NACDL's brief to address the inapposite cases it relies upon and to urge this Court to reject NACDL's reasoning and proposed rule. NACDL relies on *Ex Parte Henderson*, 384 S.W.3d 833 (2012) for the proposition that Texas has held that new scientific opinions applied to facts known at trial can constitute newly discovered evidence under Texas's test for newly discovered evidence. But a review of *Henderson* reveals several important differences between that case and Fero's case. First, the appellate court in *Henderson* framed the issue as involving newly *available* evidence, not newly discovered evidence that could not have been discovered with the exercise of due diligence. *Henderson*, *supra*, at 833, 835. Second, the opinion does not make clear what the test is for granting a new trial based on newly available evidence beyond that a defendant must show "extreme

materiality," which is to say that a defendant must show "by clear and convincing evidence that, given the newly available evidence of innocence in addition to the inculpatory evidence presented at trial, no reasonable juror would have convicted him." *Henderson* at 835. Notably, there is nothing in this "test" about the evidence being merely impeaching, and nothing in this test about the evidence having been discovered, and the petition brought, with due diligence. Third, this case involved an expert witness who testified for the State at trial *recanting* his trial testimony. *Henderson* at 833-34. And fourth, the decision in this case was made *after* the trial court held a reference hearing and recommended a new trial be ordered. *Henderson* at 834. This case is not helpful to a case involving a claim of newly discovered evidence in Washington.

NACDL cites to *People v. Bailey* 144 A.D.3d 1562, 41 N.Y.S.3d 625 (2016), in which the Court casually states "[i]n general, advancements in science and/or medicine may constitute newly discovered evidence." *Bailey* at 1564. But upon review of the cases the *Bailey* Court relied on for this statement we find that the first case, *People v. Chase*, 8 Misc.3d 1016 [A] (2005 NY Slip Op 51125 [U] [2005] is not an appellate decision and is unreported, which in New York means it is citable but will not be given stare decisis effect. *Yellow Book of N.Y. v. Dimilia*, 188 Misc.2d 489, 729 N.Y.S. 286 (2001), Fn 1. Further, this case (involving new science in the

area of arson) does not rely on any published authority which recognizes the ability of courts in New York to treat new scientific opinions as newly discovered evidence. This issue does not appear to have been argued by the parties. *People v. Chase*, *supra.* The second case the *Bailey* Court relied on for this proposition, *People v. Callace,* 151 Misc.2d 464, 573 N.Y.S.2d 137 (1991), did not involve new medical *opinions.* Rather, it involved the testing of semen using a new method called DNA testing, which was not in existence at the time of the defendant's 1987 trial. DNA evidence is unique because it definitely identifies a perpetrator and definitely excludes non-perpetrators. It is not a matter of *opinion.* The difference between *Callace* and this case is plain. *People v. Bailey*, notably, does not cite any case in which this question—the use of new scientific opinions applied to evidence that was known at the time of trial to reverse convictions on the theory of newly discovered evidence—has been specifically litigated. This stands in stark contrast to Washington, in which this question has been litigated several times, and in each case adversely to the defendant. See e.g. *In re Copland*, 176 Wn.App. 432, 309 P.3d 626 (2013), *State v. Harper*, 64 Wn.App. 283, 292, 923 P.2d 1137 (1992), *State v. Evans*, 45 Wn.App. 611, 613-14, 726 P.2d 1009 (1986), *rev. denied*, 107 Wn.2d 1029 (1987). Finally, *Bailey* involved a reference

hearing, which notably did not occur in this case. *Bailey* is unpersuasive authority.

NACDL cites *Sewell v. State,* 592 N.E.2d 705 (1992), which involved an appeal of the trial court's denial of the defendant's request to have the evidence in his case subjected to DNA testing, which did not exist at the time of his 1981 trial. Moreover, there had been a hearing in the trial court, unlike in Fero's case. *Sewell*, like *Callace, supra,* is inapposite to this case.

NACDL cites to *Smith v. Florida*, 23 S.3d 1277 (2010), in which the defendant brought the Florida equivalent of a Washington CrR 7.8 motion citing news reports that comparative bullet lead analysis was no longer in use because it had been abandoned by the FBI as unreliable. Thus, it was no longer admissible. *Smith v. Florida* at 1278. The trial court had summarily denied the motion under Florida Rule of Criminal Procedure 3.850. Under that rule, a court must summarily dismiss a motion if the motion is untimely or insufficient on its face. Rule 3.850 (f)(1). This is the only circumstance in which the trial court is permitted to summarily dismiss the motion. *Id.* The *Smith* opinion is uniquely unhelpful in this case because the opinion does not state the grounds on which the trial court had summarily dismissed the motion. It discusses no findings of fact or conclusions of law. The opinion merely holds that the

trial court erred and remands the matter for a hearing. *Smith* is not useful authority for this Court.

Clark v. Florida, 995 So.2d 1112 (2008), is equally unhelpful here. This case, like *Smith*, involved the summary denial by a trial court of a post-conviction motion, and, like *Smith,* the opinion fails to make clear the trial court's basis for the summary denial. Additionally, the opinion fails to explain what the nature of the scientific theory that had been "discredited or abandoned" was. *Clark* at 1113. Although the opinion makes reference to DNA, that part of the opinion appears to apply to the defendant's claim that the State failed to preserve evidence. *Id.* at 1113-1114. NACDL's summary of the holding in this case, namely that it settled a controversy between the parties about whether advances in scientific theory may constitute newly discovered evidence, is simply not found in the case. Ultimately, the *Clark* Court reversed the trial court because

> Although the postconviction court's conclusion on this point may be correct, we cannot properly review its determination because the postconviction court did not attach to its order any portion of the record containing the victim's testimony. In addition, the postconviction court did not attach to its order a copy of the trial testimony concerning the scientific evidence that Mr. Clark contends has recently been discredited. Accordingly, we reverse the summary denial of ground one and remand for further proceedings. On remand, if the postconviction court denies claim one again, it must attach relevant portions of the

> record conclusively refuting the claim or conduct an evidentiary hearing.

Clark at 1113-1114.

Stated another way, the case was reversed on procedural grounds. Notably, the opinion does not discuss any precedent in Florida, as exists in Washington, holding that the principles of finality preclude the use of newly retained expert testimony, which disagrees with the scientific conclusions drawn by experts who testified at trial, to secure a new trial based on a theory of newly discovered evidence.

State v. Behn, 375 N.J. Super. 409, 868 A.2d 329 (2005), is another case involving comparative lead bullet analysis, which is no longer admissible. In *Behn,* the defendant filed what would be the equivalent of a CrR 7.8 hearing and the trial court denied the motion without a hearing because, among other things, the trial court found that the defendant did not asked with reasonable diligence in discovering the evidence. *Behn* at 429-430. The *Behn* Court also held that evidence can only be considered impeaching if it would not ordinarily make a difference in the jury's verdict. *Behn* at 432. The Court held, in other words, that calling something "impeaching" is a way of saying the evidence is " not of great significance." *Behn* at 432, citing *State v. Ways*, 180 N.J. 171, 188-89, 850 A.2d 440 (2004). That is not the definition of " impeaching" in

Washington. "Impeachment" is not synonymous with "weak evidence" in Washington. Impeachment, rather, is a tool for showing contradiction, bias, character or lack of character, and inconsistent statements. 5A Wash. Prac., Evidence Law and Practice §607.2 (6th ed.). Impeachment is also defined as discrediting. Black's Law Dictionary, Eighth Edition at 768. *Behn* is inapposite in Washington.

NACDL also cites to *Commonwealth v. Epps,* 474 Mass. 743, 53 N.E.3d 1274 (2016), a Massachusetts case which was tried in 2007 - well after the alleged shifting of the paradigm of abusive head trauma is said to have begun. The Court, relying both on a hybrid theory of ineffective assistance of counsel for failing to call expert witnesses and on newly discovered evidence, held that based on *In re Fero*, the defendant was entitled to a new trial. Nowhere in the opinion does the Court set forth a test for determining whether newly discovered evidence warrants a new trial. The opinion makes reference to having to finda "a substantial risk of miscarriage of justice," but this appears to be part of its test for ineffective assistance of counsel. *Epps* at 755-770. Notably, the award of a new trial came after a reference hearing. Also notably, the facts in *Epps* bear no resemblance to the facts in Fero's case. To the extent that *Epps* presents persuasive authority to this Court, the State disagrees with the holding in *Epps* insofar as it finds that testimony about short falls was essentially

unavailable at the time of *Epps* 2007 trial, and obviously disagrees with the Court's reliance on *In re Fero.*

Finally, NACDL cites to *Edmunds*, 308 Wis.2d 374, 746 N.W. 590 (2008), and again makes the mistake of characterizing the facts in *Edmunds* as similar to the facts in Fero's case (they are not), and fails to point out that the test for newly discovered evidence in Wisconsin is different from the test for newly discovered evidence in Washington. The State discussed these points in its Supplemental Brief of Petitioner as well as its Response to Amicus Curiae The Innocence Network.

NACDL goes on to cite a series of ineffective assistance of counsel cases which were based on claims that the defense attorneys in question either failed to explore a defense or failed to call expert witnesses). These cases are unhelpful to this Court because the standard for granting a new trial based on ineffective assistance of counsel is different than the standard for reversing a conviction based on newly discovered evidence. More importantly, these cases are unhelpful to this Court because Fero's entire claim rests on the idea that this expert testimony was *unavailable* to her attorney because it *didn't exist.* How can she accuse her lawyer for being ineffective for not knowing what she claims he was in no position to know? It is worth noting that the State argued in its Motion to Reconsider and maintains here that Fero's petition is an ineffective assistance of

counsel claim (which is expressly time-barred) masquerading as a claim of newly discovered evidence. Lucid interval was widely discussed in the national media at the time of the Boston Nanny trial in 1997. Fero's retained defense attorney, Mark Muenster, mentioned lucid interval at several points in the verbatim report of proceedings. Finally and most tellingly, this petition contains no declaration from Mark Muenster that he was *unaware* of lucid interval as a concept or an available argument at the time of Fero's 2003 trial. The lack of a declaration from Mr. Muenster allows this Court to infer that a declaration from him would be unfavorable to Fero on this point. Mr. Muenster selected the most logical defense of Fero—that someone else did it—that was available to him based on *all* of Fero's injuries as well as her numerous inculpatory statements and the rest of the evidence in the case.

The arguments and citations to authority made by NACDL are unpersuasive and this Court should reverse the Court of Appeals.

II. This court should not accept NACDL's invitation to write the due diligence requirement out of the test for newly discovered evidence and out of the rule for filing personal restraint petitions.

NACDL's argument can be summed up as follows: Even if Fero could have known about scientific disagreements surrounding abusive head trauma and lucid interval at the time of her trial or at any time prior

to her filing this petition in 2014, she should be forgiven for waiting so long to file this petition. This argument strains credulity. As the State argued in both its Motion to Reconsider and its Supplemental Brief of Petitioner, Fero did not act with due diligence in "discovering" these new opinions or in bringing her personal restraint petition.

NACDL essentially argues that the *availability* of the arguments is not determinative. Rather, it is the *strength* of the arguments that controls the question of whether a petitioner has acted with due diligence. Stated another way, NACDL thinks it was entirely acceptable for Fero to burn through *six years*—the time between the decision in *Edmunds* and the time she filed her petition from prison—before she sought a new trial because the ideas put forth in both the studies relied on in *Edmunds* (which necessarily pre-date the opinion) and in the *Edmunds* decision itself needed time to marinate. NACDL cites no apposite authority for this extraordinary new rule it asks this Court to adopt. Because the Court of Appeals identified the decision in *Edmunds* as the watershed event that necessitated reversal of Fero's conviction, and because Fero waited six more years to file her petition, she has necessarily failed to show due diligence in bringing this petition under RCW 10.73.100 (1). The Court of Appeals erred in holding that Fero should be effectively excused from any due diligence requirement in bringing this petition because the Court

misunderstood the record and erroneously believed Fero went into custody following her conviction in 2003, rather than three years later[1], and because the Court appeared to misunderstand that Fero's incarceration did not prevent her from filing this 226 page petition, which she filed *before* her release.

NACDL asks this Court to re-write RCW 10.73.100(1), as well as CrR 7.5 and 7.8 and effectively eliminate the requirement of due diligence in the newly discovered evidence context. This would further require this Court to overrule any cases which adhere to the due diligence requirement. This Court should decline this invitation.

CONCLUSION

The arguments by NACDL are unpersuasive and should be rejected. The Court of Appeals should be reversed.

////

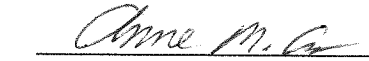
////

[1] Fero was out of custody during the pendency of her appeal. She went into custody on February 24, 2006. See Appendix.

DATED this 23rd day of May 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 

ANNE M. CRUSER, WSBA #27944
Senior Deputy Prosecuting Attorney
OID #91127

APPENDIX

Washington State Department of Corrections — Felony Offender Reporting System

FORS

- Home
- Search For An Offender

Offender

- General Information
- Confidential Offender Information
- Conviction Information (Law Enforcement Only)
- Board, Court and DOC Imposed Conditions
- Offender Movement History
- DOC Sex / Kidnap Offender Registration Information

Help

- FORS User's Guide (.pdf)

SUPERVISED: FERO, Heidi

DOC Number:	SID Number:	Current Status:	Current Location:
891886	WA21128394	SUPERVISED	East Vancouver

Offender Movement History

CCO:	CCO Telephone:	CCO Location:
Gunn, Sadie	(360) 449-7663	East Vancouver
Latest Projected Release Date:	Last Release From:	
	Washington Corrections Center For Women	

Movement History

Status	Date	Status	Date	Status	Date
SUPERVISED	7/30/2014 - PRESENT				
PRISON	2/24/2006 - 7/30/2014				

CLARK COUNTY PROSECUTING ATTORNEY

May 23, 2017 - 4:27 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	92975-1
Appellate Court Case Title:	Personal Restraint Petition of Heidi Charlene Fero
Superior Court Case Number:	02-1-01117-9

The following documents have been uploaded:

- 929751_Other_20170523162226SC519948_2821.pdf
  This File Contains:
  Other - Response to Amicus Brief - NACDL
  The Original File Name was Response to Amicus Brief-NACDL.pdf

A copy of the uploaded files will be sent to:

- ellis_jeff@hotmail.com
- cindy@defensenet.org
- nf@neilfoxlaw.com
- jcbaird@perkinscoie.com
- jeffreyerwinellis@gmail.com
- kwebber@co.snohomish.wa.us
- cntypa.generaldelivery@clark.wa.gov
- krhuber@uw.edu
- mhupp@perkinscoie.com
- taylorball@dwt.com
- pamloginsky@waprosecutors.org
- Anne.cruser@Clark.wa.gov
- Pamela.Bradshaw@clark.wa.gov

Comments:

Sender Name: Pamela Bradshaw - Email: Pamela.Bradshaw@clark.wa.gov
Filing on Behalf of: Anne Mowry Cruser - Email: Anne.cruser@Clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 4476

Note: The Filing Id is 20170523162226SC519948